IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 10 OF 2005.

1. Shri Sandesh Ka. Dessai,
son of K. Dessai,
major in age, occupation business,
resident of Mastimol,
Canacona, Goa.

2. State,
represented by the Public
Prosecutor at Margao,
Goa. ..... Applicants.

Versus

Shri Dattaraj Keshav
Prabhu Gaonkar,
Occupation business,
resident of House No. 124,
Sadloxem, Canacona, Goa. .... Respondent

Shri P.A. Kamat, Advocate for the Petitioners.

Respondent in person.

**Coram: V. M. KANADE, J.**

**DATE: 20th JULY, 2005.**

**J U D G M E N T:**

The petitioner No.1 is the original complainant. He is challenging the Order passed by the Addl. Sessions Judge, South Goa, Margao in Criminal Appeal No. 22/2004, whereby the Sessions Judge was pleased to acquit the accused of the offence punishable under Section 138 of the Negotiable Instruments Act and has set aside the Order passed by the J.M.F.C. convicting the accused under S.138 of the said Act.

2. The applicant/petitioner had filed a complaint in the Court of J.M.F.C. under S.138 of the said Act and it was alleged in the said complaint that the accused owed a sum of Rs.39,700/- to him and a cheque for the said amount was issued in respect of the transaction of cement supplied between the applicant and the original accused. When the said cheque was presented in the Bank by the applicant, it was returned with a remark that the funds in the account of the respondent/accused were insufficient. The trial Court convicted the accused on the basis of the evidence. From the Judgment of the trial Court, it can be seen that the trial Court has not considered the examination and cross-examination of the complainant and without appreciating the defence raised by the accused, convicted the accused for the offence punishable under S.138 of the said Act.

3. Against the said Order, the accused preferred appeal before the Sessions Judge, South Goa. The Sessions Judge has considered the admission given by the complainant in his cross-examination. The Sessions Judge has observed that in the cross-examination the complainant had specifically stated that there was no business transaction between him and the accused and further that he has not stated in the complaint that the cheque was issued in respect of the transaction between him and the accused. The learned Sessions Judge further observed that the complainant also admitted in his cross-examination that he had no document to show to the Court about any business transaction of cement between him and the accused. The Sessions Court therefore on the basis of this admission, held that the presumption which was raised under S.139 of the said Act was rebutted by the accused and therefore the

complainant had failed to prove that the cheque was issued in discharge of a legally enforceable debt or liability. In my view there is no infirmity in the Order passed by the learned Sessions Judge.

4. The learned counsel appearing on behalf of the applicant relied on the judgment of the Supreme Court in ***Goa Plast (P) Ltd. v. Chico Ursula D'Souza*** reported in (2004) 2 S.C.C., 235 and on the judgment of the Supreme Court in the case of ***K. Bhaskaran v. Sankaran Vaidhyan Balan and another*** reported in A.I.R. 1999 S.C., 3762 and also on the judgment in the case of ***K.N. Beena v. Muniyappan & anr.*** reported in 2992 (1) All MR 277 (SC). He also invited my attention to the definition of the word ' business ' and the word ' transaction ' as defined in Black's Law Dictionary 7th Edition. He submitted that even if there was a single transaction between the parties that would be covered within the meaning of S.138 of the said Act.

5. It is not possible to accept the submission made by the learned counsel appearing on behalf of the applicant. The ratio of the judgment in Goa Plast (P) Ltd. (supra) will not be applicable to the facts of the present case. In the said case the accused had issued ten post-dated cheques and thereafter he has written a letter to the applicant denying liability to pay the said amount and when the first cheque was deposited for encashment by the complainant, the cheque was dishonoured. In the said case the accused was acquitted by the Judicial Magistrate by holding that the complainant had failed to prove the liability and also holding that the respondent had rebutted the statutory presumption under S.139 of the said Act which order was confirmed by the

High Court. In the context of these facts, the Apex Court had considered the scope and object of Sections 138 and 139 of the said Act. In the present case in view of the clear admission by the complainant that there was no business transaction between the parties there was a clear rebuttal of presumption raised under S.139. In the case of K.N. Beena (supra) the High Court of Madras had acquitted the accused in a complaint filed under S.138 on the ground that the appellant had not proved that the cheque dated 6th April, 1993 had been issued for any debt or liability and in the said context held that the burden of proving that there was no debt or liability is on the accused in view of the presumption under S.139 which was rebuttable. The ratio of this judgment also will not apply to the facts of the present case as the complainant had clearly admitted in cross-examination that there was no business transaction between the parties and that the cheque had not been issued in respect of the transaction between him and the accused. The ratio therefore of this judgment also will not apply. Finally reliance was placed by the applicant on the case of K. Bhaskaran (supra). In this case also the Magistrate acquitted the accused. The High Court however set aside the order of acquittal and convicted him. In this context the Apex Court observed that there was a presumption that the holder of the cheque had received it for discharge of liability and the burden to rebut the presumption was on the accused. The ratio of this judgment also in my view will not be applicable to the present case in view of the admission given by the complainant in cross-examination. Even when the matter was listed for admission on 30th June, 2005 a query was made by this Court whether the complainant had any document to show that there was a transaction between the complainant and the accused. Though time was given on two

occasions, the applicant was unable to produce any document to show that there was a transaction of supply of cement to the accused. The scope of criminal revision application is very limited and this Court cannot substitute its own view for the view taken by the lower appellate Court. In my view the lower appellate Court has correctly appreciated the evidence on record and has recorded a finding of fact and I do not see any reason to interfere with the said Judgment and Order of the lower appellate Court.

6. In the result, Criminal Revision Application is dismissed.

**V. M. KANADE, J.**

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